BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application of Southern California Edison Company (U338E) for Approval of the Results of Its 2013 Local Capacity Requirements Request for Offers for the Moorpark Sub-Area.	Application 14-11-016 (Filed November 26, 2014)

RESPONSE OF NRG ENERGY CENTER OXNARD LLC AND NRG CALIFORNIA SOUTH LP TO APPLICATIONS FOR REHEARING OF DECISION 16-05-050

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Pursuant to Rule 16.1(d) of the Rules of Practice and Procedure ("Rules") of the California Public Utilities Commission ("Commission"), NRG Energy Center Oxnard LLC ("NECO") and NRG California South LP ("NRG South") (collectively, "NRG") submit this response to the Applications for Rehearing of Decision ("D.") 16-05-050 (the "Decision") ("Applications for Rehearing" or "AFRs") filed by the California Environmental Justice Alliance and Sierra Club ("CEJA/Sierra Club"), the Center for Biological Diversity ("CBD"), and the City of Oxnard ("City") (collectively, the "Filing Parties").

I. INTRODUCTION

The Decision approved, in part, the results of the Southern California Edison Company ("SCE") 2013 Local Capacity Requirements ("LCR") Request for Offers ("RFO") for the Moorpark sub-area of the Big Creek/Ventura local reliability area. SCE conducted its LCR RFO in accordance with the requirements of D.13-02-015 issued in the 2012 long-term procurement plan ("LTPP") proceeding. D.13-02-015 required SCE to procure between 215 and 290 megawatts ("MW") of electrical capacity in the Moorpark sub-area to meet LCR needs by 2021, largely due to the assumed retirement of approximately 2,000 MW of gas-fired generating

capacity at facilities that use once-through cooling technology ("OTC").[1] The Decision approved nine of the 11 contracts executed by SCE, and deferred consideration of the remaining two contracts to a subsequent phase of this proceeding. One of the approved contracts is a resource adequacy purchase agreement with NECO for a new 262 MW gas-fired peaking facility known as the Puente Power Project ("Puente Project") (the "Puente Contract").[2]

The Filing Parties opposed approval of the Puente Contract throughout the proceeding. The Applications for Rehearing reargue positions taken by the Filing Parties in the proceeding, which were considered and rejected in the Decision. CEJA/Sierra Club reargue CEJA's position that the Commission cannot lawfully approve the Puente Contract because SCE did not adequately consider potential environmental justice impacts, and did not state a preference in its LCR RFO for renewable projects located in Oxnard. The Decision correctly rejected those arguments, and found that the language that CEJA relies on regarding consideration of environmental justice impacts in an RFO "should be viewed as guidance." The Decision properly concluded that SCE's selection of the Puente Contract was consistent with Commission orders requiring utilities to use brownfield sites first, and substantially complied with the procurement directives in D.13-02-015.

All of the Filing Parties reargue their positions that the California Environmental Quality Act ("CEQA") requires the Commission to conduct an environmental review of the Puente Project, or await completion of the environmental review being conducted by the California Energy Commission ("CEC"). The Commission has consistently held for decades that its approval of a utility power purchase agreement is not a "project" as defined in CEQA. Contrary

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[1] D.13-02-015, Ordering Paragraph 2, Findings of Fact 5, 38, 39, 40, 41, 42, Conclusion of Law 11.

[2] Decision at 2, 26, Ordering Paragraph 1; Exhibit ("Exh.") SCE-1 (Bryson) at 55:16 through 56:5; Exh. NRG-1 (Gleiter) at 2:2-8.

to the Filing Parties' arguments, the Commission is not a CEQA responsible agency or the CEQA lead agency for the Puente Project.

CBD argues that approval of the Puente Contract violated the loading order ("Loading Order"), but CBD's argument is without merit. The record showed that it was not possible for SCE to meet the minimum capacity required by D.13-02-015 using only preferred resources, and that a gas-fired resource must be part of the Moorpark reliability solution. The Decision correctly found that the Puente Project is necessary to meet identified local reliability needs, and provides grid reliability benefits at a reasonable cost to ratepayers. The Decision's findings did not violate the Loading Order, which the Commission has confirmed must be balanced with the State's reliability and economic needs.

CEJA/Sierra Club also reargue CEJA's position that SCE improperly selected the Puente Contract based on an unsubstantiated concern that NRG South could retire existing non-OTC peaking facilities if SCE did not contract with NRG for a new plant. The Decision correctly rejected CEJA's argument. The Decision concluded that, while qualitative factors reinforced SCE's selection of the Puente Contract, the selection was supported by a quantitative assessment which demonstrated that the Puente Contract was the best resource available from the LCR RFO.

CBD argues that the LCR RFO did not comply with Commission requirements, but CBD has not identified any legal error in the Decision. CBD argues that SCE impermissibly solicited offers for resources to be operational before 2021, but SCE followed its procurement plan, which was approved by the Energy Division, when it solicited offers with potential early online dates. This was consistent with D.13-02-015, which did not prohibit resources coming online before 2021. CBD's argument also does not apply to the Puente Contract, which specifies a 2020 online date. CBD's arguments regarding contract availability and security requirements for preferred resources also lack merit. SCE has demonstrated that its LCR RFO solicited offers from all resource types, and did not discourage preferred resources from participating.

Finally, CBD argues that the Commission should have reviewed the validity of the need determination adopted in D.03-02-015 based on changed circumstances and CBD's arguments in this proceeding. CBD's argument is without merit. The Commission is not required to reevaluate the need determination adopted in an LTPP decision when it approves contracts executed to fill the authorized need. The Commission's established procurement and planning process is to determine utility LCR need in general procurement decisions, such as D.13-02-015, and not to reconsider those need determinations when approving contracts proposed to fill the approved need absent an unforeseen emergency. It was not legal error for the Commission to follow its preferred practice of not reconsidering the need determination adopted in D.13-02-015.

As the Commission recently confirmed, "[r]ehearing applications are not a proper vehicle to merely reargue positions taken during a Commission proceeding," and "are limited by [California Public Utilities Code ("PU Code")] section 1732 to specifications of legal error."[3] Because the Filing Parties have not specified any legal error, the Applications for Rehearing should be denied.

II. DISCUSSION

A. The Commission Correctly Concluded That Dicta in D.07-12-052 Regarding Environmental Justice Considerations is Guidance.

CEJA/Sierra Club argue that the Commission cannot lawfully approve the Puente Contract because SCE's evaluation of offers in the LCR RFO failed to "provide greater weight" to "disproportionate resource sitings in low income and minority communities," which is one of the qualitative evaluation criteria listed in D.07-12-052. CEJA/Sierra Club argue that SCE was required to consider this qualitative factor because Ordering Paragraph 4 of D.13-02-015

[3] D.16-05-053 at 12, citing D.12-12-040 at 3.

required that SCE's LCR RFO "shall include . . . any RFO requirements not delineated herein but specified by previous Commission procurement decisions (including Decision 07-12-052)."[4]

CEJA/Sierra Club merely reargue the position taken by CEJA and addressed extensively in the proceeding. The Decision concluded that the language that CEJA relies on from D.07-12-052 "should be viewed as guidance" that remains in effect.[5] The Decision did not, however, invalidate the LCR RFO as urged the CEJA. Instead, the Decision explained that:

> The dicta cited above from D.07-12-052 remains in effect as guidance, but the Commission to date has not yet provided further specificity regarding how the utilities should implement this guidance. D.07-12-052 provided a wide variety of other direction in Ordering Paragraphs to utilities regarding procurement activities (as have several subsequent decisions in LTPP proceedings, including D.13-02-015 and § 454.5).[6]

The Decision also recognized that the Puente Project will be built at the site of an existing power plant, which is a brownfield site, and found that D.07-12-052 provided "specific direction regarding brownfield siting in an Ordering Paragraph."[7] The Decision cited Ordering Paragraph 35 from D.07-12-052, which specifies that: "IOUs are to consider the use of Brownfield sites first and take full advantage of their location before they consider building new generation on Greenfield sites. If IOUs decide not to use Brownfield, they must make a showing that justifies their decision."[8] By selecting a project located at a brownfield site (and the site of existing OTC units), SCE followed the order in D.07-12-052 to use brownfield sites first for the

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[4] CEJA/Sierra Club AFR at 7-8.

[5] Decision at 16-17, Finding of Fact 3 ("D.07-12-052 included dicta regarding environmental justice considerations in procurement solicitations."), and Conclusion of Law 3 ("Dicta from D.07-12-052 regarding environmental justice considerations in procurement solicitations should be viewed as guidance.").

[6] *Id.* at 17.

[7] *Id.*

[8] *Id.* at 14, quoting Ordering Paragraph 35 from D.07-12-052.

siting of new generation projects. The Decision properly concluded that procurement of the Puente Contract substantially complied with the procurement directives in D.13-02-015.[9]

CEJA/Sierra Club argue that the Commission erred in characterizing the environmental justice considerations in D.07-12-052 as "dicta" and "guidance," but they are wrong. The Commission refers to statements in the body of a Commission decision as "dicta,"[10] and has held that statements in its decisions outside of Ordering Paragraphs, Findings of Fact, and/or Conclusions of Law are not part of the Commission's formal decision.[11] Where dicta are in tension with an Ordering Paragraph, the latter "takes precedence."[12] In addition, courts have distinguished between "recommendations" made in the body of a Commission decision, and orders issued in Ordering Paragraphs.[13] Because the Ordering Paragraphs, Conclusions of Law, and Findings of Fact in D.07-12-052 did not require utilities to consider impacts to low-income and minority communities, the Decision correctly noted that those statements are dicta that are "guidance," and that any such guidance must be "balance[d with] the Commission's long-standing preference for brownfield site development . . . as well as other economic and reliability considerations."[14]

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[9] *Id.* at Conclusion of Law 1.

[10] D.02-04-056 at 4 and 5, fn. 2.

[11] *See, e.g.,* D.89-04-048, 31 CPUC 2d 465 (*City of Healdsburg v. Pacific Gas and Electric Company*) at Conclusion of Law 2 ("Assuming for the sake of argument that the ordering paragraphs and a paragraph in the body of the decision are inconsistent, the ordering paragraphs are the final decision of the Commission. The ordering paragraphs are not subject to modification by a prior inconsistent statement contained in the body of the decision").

[12] *Id.*

[13] *Hillsboro Properties v. Pub. Util. Comm'n* (2003) 108 Cal. App. 4th 246, 259-260 ("In its Decision, the PUC took care not to overstep its jurisdiction. It recommended that the City amend the Ordinance to `disentangle CPUC utility rate setting jurisdiction and its own rent control jurisdiction' (Decision at p. 15), but the ordering paragraphs are directed only to Hillsboro [Properties].")

[14] Decision at 19.

The Commission's interpretation of its own decisions "is entitled to consideration and respect by the courts."[15] Courts will defer to the Commission's interpretation of its own decisions where the Commission's interpretation is reasonable and consistent with the prior decision's rationale.[16] In the Decision, the Commission exercised this discretion in interpreting the relevant procurement requirements imposed by D.07-12-052 and D.13-02-015, and found that "[d]icta from D.07-12-052 regarding environmental justice considerations in procurement solicitations should be viewed as guidance."[17] This conclusion is reasonable and, as explained above, is consistent with longstanding principles of Commission jurisprudence. CEJA and Sierra Club offer no valid justification for overturning this interpretation on rehearing.

CEJA/Sierra Club also assert that the Decision's characterization of language as "dicta" equates to a finding that the language is "mere surplusage" or "meaningless," but they are wrong. The Decision did not find that the dicta regarding environmental justice considerations is surplusage or meaningless, but instead clarified that such dicta is "guidance" that "remains in effect."[18] This is entirely consistent with D.07-12-052. In D.07-12-052, the Commission stated that "[w]e discuss below certain bid evaluation metrics that we urge the utilities, in conjunction with Independent Evaluators, Procurement Review Groups and Energy Division, to consider when developing the RFO bid documents and process," and explained that it was providing "general guidance to the IOUs" regarding the types of evaluation criteria that should be applied to bids in RFO:

> We understand that the [least cost best fit] framework cannot entirely be reduced to mathematical models and rules that completely eliminate the use of qualitative factors. However, the

[15] *Clean Energy Fuels Corp. v. Pub. Utilities Comm'n* (2014) 227 Cal. App. 4th 641, 649 ("*Clean Energy Fuels*"); *So. Cal. Edison Co. v. Pub. Util. Comm'n* (2000) 85 Cal. App. 4th 1086, 1096.

[16] *Clean Energy Fuels*, 227 Cal. App. 4th at 655.

[17] Decision at Conclusion of Law 3.

[18] *Id.* at 17.

> IOU must be able to fully justify why a particular project wins a solicitation, and *we provide here some general guidance to the IOUs regarding the types of evaluation criteria that should be applied to bids in RFOs for the resources authorized in this decision*.
>
> The bid criteria raised specifically by parties in testimony, including credit and collateral, debt equivalence, Fin(46), and transmission costs/savings, are discussed in further detail in the following sections. Other obvious criteria include capacity and energy benefits, resource diversity, portfolio fit, local reliability/resource adequacy, and congestion costs. Some criteria for which we believe the IOUs need to provide greater weight include disproportionate resource sitings in low income and minority communities, and environmental impacts/benefits (including Greenfield vs. Brownfield development).[19]

Thus, it is clear that environmental justice considerations are one qualitative consideration among the many cited in dicta in D.07-12-052 that are "general guidance" to utilities. In contrast, as recognized in the Decision, Ordering Paragraph 35 in D.07-12-052 expressly *ordered* utilities to use brownfield sites first, and to take full advantage of their location before they consider building new generation on greenfield sites. SCE complied with the Commission's order by selecting the Puente Contract.[20]

CEJA/Sierra Club also wrongly insist that the dicta regarding environmental justice considerations cannot be guidance because the qualitative criteria from D.07-12-052 are "enshrined" in the Procurement Manual for utilities.[21] The Procurement Manual repeats the guidance from D.07-12-052. This does not contradict or undermine the Decision's conclusion that dicta in D.07-12-052 regarding environmental justice considerations "should be viewed as

[19] D.07-12-052 at 156-157 (emphasis added).

[20] The requirement in Ordering Paragraph 35 of D.07-12-052 specifying that utilities must use brownfield sites first is also stated in D.07-12-052 in Finding of Fact 103 and Conclusion of Law 55, and in D.04-12-048 in Finding of Fact 101 and Conclusion of Law 38.

[21] CEJA/Sierra Club AFR at 7.

guidance."[22] The Procurement Manual also requires utilities to procure brownfield sites first, and states that: "Preference should be give [sic] to procurement that will encourage the retirement of aging plants, inefficient facilities with once–through cooling, by providing, at minimum, qualitative preference to bids involving repowering of these resources or bids for new facilities at locations in or near the load pockets in which these resources are located."[23] Further, the Procurement Manual was developed by the Energy Division, and is not a Commission decision. It cannot dictate how the Commission interprets its decisions.

CEJA/Sierra Club also incorrectly argue that dicta regarding environmental justice considerations cannot constitute guidance because "no additional guidance is required for an IOU to consider whether its procurement impacts low-income or minority communities."[24] This reflects CEJA's continued insistence that environmental justice considerations in an RFO must outweigh all other factors. D.07-12-052 did not specify that utilities must give disproportionate consideration to environmental justice factors over other considerations. D.07-12-052 also did not specify that qualitative considerations would override the utilities' quantitative analysis of which resources are the lowest cost and best fit for the utility's need. Utilities have flexibility to apply relevant qualitative considerations in their RFO resource evaluations, as long as they "fully justify why a particular project wins a solicitation."[25]

SCE has fully justified why the Puente Contract was a winning contract in the LCR RFO. SCE's testimony and the Independent Evaluator's report show that SCE selected the winning contracts for the Moorpark sub-area based primarily on its quantitative analysis of net market value – namely, the value of a resource's energy, ancillary services, and capacity benefits, minus

[22] Decision at Conclusion of Law 3.

[23] Procurement Manual at 4.9, citing D.07-12-052 at 2.6.

[24] CEJA/Sierra Club AFR at 7.

[25] D.07-12-052 at 158.

fixed and variable offer-related costs.[26] SCE showed that it was not possible to procure the required minimum level of incremental capacity for Moorpark using only preferred resources, and demonstrated that a gas-fired project must be part of the Moorpark reliability solution.[27] SCE demonstrated that the Puente Contract was the most cost effective gas-fired offer.[28] As noted above, the Puente Project will be located at the site of existing OTC units that are scheduled to retire at the end of 2020.[29] SCE's selection of a new plant at an OTC site is supported by the Commission's findings in D.13-02-015 that: "Gas-fired resources at the current OTC sites are certain to meet the ISO's criteria for meeting LCR needs"; and "The most likely locations for [sic] to meet LCR needs in the Moorpark sub-are are the sites of the current OTC plants."[30] As discussed above, selection of the Puente Contract also satisfies the mandates in D.07-12-052 and D.04-12-048 that require utilities "to consider the use of brownfield sites first and take full advantage of their existing location before they consider building new generation on greenfield sites."[31]

B. Approval of the Puente Contract Did Not Violate PU Code Section 399.13(a)(7).

CEJA/Sierra Club reargue another position advanced by CEJA in this proceeding, namely CEJA's claim that SCE violated PU Code section 399.13(a)(7) because SCE "did not, in either its solicitation or procurement efforts, express any preference for renewables in Oxnard."[32] The Decision considered and rejected that argument, and found that "as CEJA itself notes, this

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[26] Exh. SCE-1 (Singh) at 30-49; Exh. SCE-2, Appendix D (Independent Evaluator Report) at 5.

[27] Exh. SCE-7 (Cushnie) at 1:20 through 2:1; Exh. SCE-7 (Bryson) at 14:16-18.

[28] Exh. SCE-1 (Singh) at 30-49, 46:1-2; Exh. SCE-2, Appendix D (Independent Evaluator Report) at 39.

[29] Exh. SCE-1 (Bryson) at 56:4-5.

[30] D.13-02-015 at Findings of Fact 26 and 38.

[31] D.04-12-048 at 159, Finding of Fact 101, Conclusion of Law 38; D.07-12-052 at 230, Finding of Fact 103, Conclusion of Law 55, Ordering Paragraph 35.

[32] CEJA/Sierra Club AFR at 9.

section is on its face applicable to Commission review of renewable procurement."[33] The Decision concluded that: "Pub. Util. Code § 399.13 does not apply to all-source procurement contracts."[34]

CEJA/Sierra Club argue that the Decision is wrong, because SCE's LCR RFO was an all source RFO that sought offers for renewable resources alongside other resource types,[35] but their argument contradicts the statute. PU Code section 399.13 specifies requirements for utilities' renewable energy procurement plans to meet California's Renewables Portfolio Standard ("RPS"). PU Code section 399.13(a)(7) states that "[i]n soliciting and procuring eligible renewable energy resources for California-based projects, each electrical corporation shall give preference to renewable energy projects that provide environmental and economic benefits to communities afflicted with poverty or high unemployment, or that suffer from high emission levels of toxic air contaminants, criteria air pollutants, and greenhouse gases." The Moorpark LCR RFO was not conducted to meet RPS requirements pursuant to a renewable energy procurement plan governed by PU Code section 399.13. The Decision correctly found that PU Code section 399.13(a)(7) is not applicable in this context.

However, even if PU Code section 399.13(a)(7) applies to an all source LCR RFO, CEJA/Sierra Club's argument regarding preference fails, because SCE selected every renewable resource final offer submitted for the Moorpark sub-area.[36] Selection of all renewable offers is evidence that SCE did not fail to give preference to any renewable resource offers, including any offers that provide the benefits identified in PU Code section 399.13(a)(7).

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[33] Decision at 17.

[34] *Id.* at Conclusion of Law 4.

[35] CEJA/Sierra Club AFR at 8.

[36] Exh. SCE-7 (Bryson) at 14:2-3; Exh. SCE-7 (Cushnie) at 1:20 through 2:1.

C. Approval of the Puente Contract Did Not Violate Government Code Sections 65040.12(e) and 11135.

CEJA/Sierra Club argue that approval of the Puente Contract violates Government Code sections 65040.12 and 11135,[37] but neither statute applies to the Commission's review of the Puente Contract. Government Code section 65040.12 requires the Governor's Office of Planning and Research to coordinate the use of environmental justice data in land use plans. Governmental Code section 65040.12, subsection (e) defines the term "environmental justice" for purposes of section 65040.12, and does not, as CEJA/Sierra Club argue, impose any requirement that applies in this proceeding.[38] Likewise, Government Code section 11135 and implementing regulations, aimed at avoiding discrimination based on race, national origin, ethic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability in programs administered or funded by the State, are wholly irrelevant.[39] State funds are not involved in the Puente Contract. Similarly, the list of State laws cited by CEJA/Sierra Club in footnote 37 of their Application for Rehearing are inapplicable on their face.

D. This Proceeding Appropriately Focused on Whether SCE Followed the Procurement Plan Approved by the Energy Division.

As noted above, CEJA alleged throughout the proceeding that the LCR RFO should have stated an explicit preference for renewable projects located within the City of Oxnard. This would have necessitated changes to the procurement plan approved by Energy Division. D.13-02-015 established a process for SCE to procure the required LCR resources, based on a procurement plan to be approved by the Energy Division.[40] Ordering Paragraph 4 of D.13-02-015 specified the elements to be included in SCE's LCR RFO, and Ordering Paragraph 5 required SCE to submit a procurement plan to the Energy Division, and to show that

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[37] CEJA/Sierra Club AFR at 9-10.

[38] CEJA/Sierra Club AFR at 9; Gov. Code section 65040.12(e).

[39] Gov. Code 11135; 22 C.C.R. section 98101.

[40] D.14-08-008 at 2-3.

the plan satisfies Ordering Paragraph 4. In compliance with these requirements, the format of SCE's LCR RFO structure was "detailed in SCE's LCR Procurement Plan" and "approved by the Energy Division."[41]

The Energy Division's approval of SCE's LCR procurement plan confirmed that SCE's LCR RFO format and documents – including the participant instructions where any preference for specific resource types or locations would be specified – complied with D.13-02-015. NRG argued that the Commission should reject CEJA's collateral attack on the Energy Division's approval of SCE's procurement plan and the LCR RFO format and documentation described therein, consistent with prior Commission decisions.[42]

CEJA attempted to justify its collateral attack by arguing that this Application proceeding was CEJA's "first and only opportunity to challenge the adequacy of SCE's procurement plan."[43] In response to CEJA's arguments, the Decision concluded that:

> This proceeding appropriately considers whether SCE followed its procurement plan, not whether the plan itself was adequate. As discussed herein, pursuant to D.13-12-015 [sic], Energy Division approved SCE's procurement plan which included procurement for the Moorpark sub-area in September 2014. If CEJA or another party contended that the *process* authorized in D.13-02-015 for review of SCE's procurement plan was unlawful, they could have filed an application for rehearing of that decision on this point.[44]

In their Application for Rehearing, CEJA/Sierra Club once again challenge the legality of the process for Energy Division to approve SCE's procurement plan.[45] This is another

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[41] Exh. SCE-1 (Bryson) at 11:5-6; D.14-08-008 at 3.

[42] *See* D.14-08-008 at Finding of Fact 5 ("It is the function of the Energy Division to determine if the SDG&E procurement plans are in compliance with D.14-03-004."); D. 15-05-051 at 5-6.

[43] Decision at 18.

[44] *Id.* (emphasis added).

[45] CEJA/Sierra Club AFR at 10-13.

impermissible collateral attack on D.13-02-15. As CEJA/Sierra Club acknowledge, D.13-02-015 specified that Energy Division would review and approve SCE's procurement plan for consistency with the requirements of D.13-02-015. CEJA/Sierra Club complain that they were deprived of the opportunity to review and comment on the procurement plan before it was approved, but they were aware of the process adopted in D.13-02-015 and could have challenged the legality of the process in an application for rehearing of D.13-02-015. Having failed to do so, they are barred from challenging the legality of the process for approval of the procurement plan at this juncture.[46]

CEJA/Sierra Club's objection is also misplaced because they were not denied any right or opportunity to object to selection of the Puente Contract based on environmental justice considerations. The Decision fully considered CEJA/Sierra Club's arguments in opposition to the LCR RFO process and the Puente Contract. In particular, CEJA's claims regarding environmental justice considerations were fully vetted and considered. Ultimately, the Decision found that CEJA's environmental justice arguments did not warrant invalidation of the LCR RFO or rejection of the Puente Contract. CEJA/Sierra Club may disagree with that conclusion, but they cannot credibly assert that they were denied the right to raise environmental justice objections to approval of the Puente Contract.

[46] The case cited by CEJA/Sierra Club does not support their argument. CEJA/Sierra Club cite *So. Cal. Edison Co. v. Pub. Util. Comm'n.,* where the Court rejected a claim that the Commission had unlawfully deleted authority to the CEC. 227 Cal.App.4th 172 at 195-96. In D.13-02-015, the Commission authorized the Energy Division to review and approve utilities' procurement plans for consistency with the Commission's decisions. This was not a "total abdication of authority" as CEJA/Sierra Club allege. The Commission established the requirements for SCE's procurement plan in D.13-02-015 and prior decisions, and did not unlawfully delete a general policymaking power. The process adopted in D.13-02-015 is consistent with the standards articulated by the court in the case cited above.

E. CEQA Does Not Require the Commission to Conduct an Environmental Review of the Puente Project, or Wait for the CEC's Review.

CBD argues that the Decision violated CEQA because the Commission failed to conduct an environmental review of the Puente Project.[47] CEJA/Sierra Club argue that the Commission is a "responsible agency" for the Puente Project under CEQA, and therefore is required by CEQA to "await completion of CEQA review by the lead agency, which is the CEC" before approving the Puente Contract.[48] The City purports to "join" CEJA/Sierra Club's arguments, but with the modified position that "the Commission is the first agency to exercise discretion over the Puente project," and "is therefore the lead agency under CEQA and required to conduct environmental review of the Puente project."[49]

All of these arguments rely on an incorrect legal premise – namely that the Commission's approval of the Puente Contract is a "project" as defined by CEQA. This is simply wrong, as confirmed by longstanding Commission precedent holding that Commission approval of a power purchase agreement is not a project for purposes of CEQA. Because approval of the Puente Contract is not a CEQA "project," all of the Filing Parties' CEQA arguments are without merit, as explained below.

1. The Commission's approval of the Puente Contract is not a "project" that triggers environmental review under CEQA.

CEQA applies only to discretionary "projects" proposed to be carried out or approved by public agencies.[50] CEQA defines a "project" as an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, *and which is any of the following*:

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[47] CBD AFR at 4-16.

[48] CEJA/Sierra Club AFR at 14.

[49] City AFR at 1.

[50] California Public Resources Code ("PR Code") section 21080(a).

(a) an activity directly undertaken by any public agency;

(b) an activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; or

(c) an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.[51]

It is well established that the Commission's approval of a power purchase agreement executed by a Commission-regulated utility is not a "project" for purposes of CEQA. The Commission has reached this conclusion consistently for decades. In 1986, the Commission concluded that CEQA review was not required for approval of the request of Pacific Gas and Electric Company ("PG&E") for cost recovery of a power purchase agreement for the output of the Dinkey Creek Hydroelectric Project, and explained that:

> The present application does not involve the granting of a lease, permit, license, certificate or other entitlement for use. PG&E is requesting approval of a power purchase agreement. PG&E is neither the builder nor the owner of the proposed Dinkey Creek Project. PG&E seeks only to obtain assurance that it will recover through its rates the payments made under the agreement. Such a ratemaking order is not a "project" under CEQA. This issue has been raised before the Commission and the California Supreme Court on several occasions. All Commission orders concluding that CEQA does not apply to a ratemaking proceeding have been upheld. (E.g., *Samuel C. Palmer, III v. Public Utilities Commission* SF# 23980, writ denied 5/10/79.)[52]

In subsequent decisions, the Commission has repeatedly confirmed that CEQA does not require the Commission to conduct an environmental review when reviewing and approving utility power purchase agreements.[53] The Commission recently again confirmed that

[51] PR Code section 21065.

[52] D.86-10-044, 1986 Cal PUC LEXIS 642, 22 CPUC2d 114.

[53] *See e.g.*, Resolution E-4686 (confirming that review of "the CA Flats PPA is not a `project' pursuant to CEQA"); Resolution E-4522 ("The Commission reiterates that while it acknowledges that environmental issues with Rio Mesa 2 have the potential to pose significant risks, the Commission will not pre-judge the projects in light of these issues. The Commission also notes that environmental permitting for the PPAs is the jurisdiction of the California Energy Commission."); Resolution E-4467 ("Commission review of a

Commission approval of power purchase agreements does not require environmental review under CEQA, and rejected many of the same arguments that are now repeated in the Applications for Rehearing. In D.15-05-051, the Commission approved a power purchase tolling agreement ("PPTA") executed by San Diego Gas and Electric Company ("SDG&E") for a new gas-fired power plant, and rejected CBD's argument that CEQA review was required:

> To the contrary, CEQA Guidelines, long-standing case law, and Commission precedent all make clear that Commission review of purchase power contracts does not trigger CEQA. A contract for purchase power by a regulated entity is not a "project" pursuant to CEQA. CEQA defines a "project" as "[a]ctivities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Public Resources Code § 21065.) Commission approval of a purchase power contract does not confer a lease, permit, license, certificate, or any other entitlement on the seller. Rather, it is an assurance that the utility will recover through its rates the costs that it incurs under the contract. It is well-settled that "[s]uch a ratemaking order is not `project' under CEQA. All Commission orders concluding that CEQA does not apply to a ratemaking proceeding have been upheld. (E.g., Samuel C. Palmer, III v. Public Utilities Commission SF# 23980, writ denied 5/10/79.)" (D.86-10-044 at 16-17, 1986 Cal. PUC LEXIS 642, 16-17 (Cal. PUC 1986).)
>
> Likewise, the Commission is not a "responsible agency" under CEQA when it approves purchase power contracts. A "responsible agency" is defined as a public agency other than the lead agency which has discretionary approval power over the project. (Public Resources Code § 21069.) While the Commission has considerable discretion over whether to approve a purchase power contract, it does not have power to approve or deny the underlying generation project. The project underlying the purchase power

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PPA is not review of a "project," but a review of the costs SDG&E's ratepayers will incur pursuant to the proposed PPA. Further, any project, as defined by CEQA, is subject to all applicable environmental laws."); Resolution E-4439 ("As previously noted by this Commission, the Commission's review of PPAs is confined to approval of costs pursuant to a PPA. Further, Commission approval of the PPA does not exempt the project from compliance with all applicable environmental laws nor does it limit the review of project alternatives should future environmental reviews of the development projects require such analysis.").

> contract could proceed regardless of the Commission's decision. (Id. at 16-18.)[54]

CBD argues that the conclusions in D.15-05-051 are wrong,[55] but the Commission already considered and rejected CBD's objections in its decision denying rehearing of D.15-05-051. In D.15-11-024, the Commission rejected CBD's arguments and elaborated as follows:

> Despite CBD's protests, we have adequately explained the reasons that PPTA approvals are not CEQA projects. (See Decision, at pp. 29-31.) Pursuant to CEQA, a CEQA project must be one of the following:
>
> (a) An activity undertaken by a public agency.
>
> (b) An activity undertaken by a person which is supported… from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.
>
> (Pub. Resources Code, § 21065.)
>
> SDG&E's application is not a CEQA project because our consideration of SDG&E's application for authorization to enter into the Carlsbad PPTA does not fit within any of these categories. Our PPTA proceedings are utility applications for authority to enter into agreements with power generators to purchase electricity. In PPTA proceedings, we evaluate the proposed contracts for consistency with Commission requirements, and decide on whether to authorize the utilities to enter into the contracts and recover costs of the PPTA in rates. These proceedings are largely in the nature of reasonableness reviews in advance of the utility's commitment. (See § 454.5(d)(2).) As such, we do not issue "a lease, permit, license, certificate, or other entitlement for use," to the utility when approving a PPTA, and a PPTA application is not a CEQA project.
>
> Moreover, as we have explained, in PPTA applications, the utility, and not the project proponent, is the applicant. Here, we do not have jurisdiction over Carlsbad Energy Center, the underlying project proponent, and do not approve or disapprove the generation project itself. (See Decision, at p. 30.) It is Carlsbad Energy

[54] D.15-05-051 at 29-30 (footnotes omitted).

[55] CBD AFR at 16-21.

Center which is actually proposing to construct the plant, and its application to construct the Carlsbad Project has been considered by the California Energy Commission ("CEC") in separate proceedings outside of this agency.

In its argument, CBD does not acknowledge or rebut our explanation that PPTA applications do not fit within the CEQA definition of project. Instead, CBD focuses on other required elements for triggering CEQA review requirements, such as whether the project is discretionary (Pub. Resources Code, § 21080 (a)), and whether it may cause a physical change in the environment (Pub. Resources Code, § 21065). (CBD App. Rehg., at p. 2.) This argument is misplaced, because regardless of whether the PPTA review is discretionary, or has potential to impact the environment, SDG&E's PPTA application does not fit within the definition of a CEQA project pursuant to the Public Resources Code.

In quoting a portion of Public Resources Code section 21065, CBD omits the portion quoted above that specifies that only certain types of actions constitute CEQA projects. As a result, CBD fails to counter our conclusion that the PPTA application does not fit within the CEQA definition because it is not issuance of "a lease, permit, license, certificate, or other entitlement for use." (Pub. Resources Code, § 21065.)

Similarly, CBD's objection that our explanation of why SDG&E's application is not a CEQA project is not "legally cognizable" (CBD App. Rehg., at p. 14) is mistaken. CBD claims that our "entire argument" that the Carlsbad PPTA is not a project "is based entirely upon a 1979 denial of a writ and a 1986 Commission decision that cites only to the 1979 denial." (Ibid.) CBD goes on to argue that the writ denial is not citable authority. (Id., at 14-18.) To the contrary, our reference to the 1979 writ denial, *Palmer v. Public Utilities Commission*, SF# 23980, is not relied upon as precedent. Rather, *Palmer* is only noted in a quote from one case in a long line of Commission decisions and Energy Division resolutions concluding that PPTA applications, and ratemaking applications generally, are not CEQA projects. It is these decisions that constitute the well-established precedent. Thus, the basis for our conclusion that PPTA applications are not CEQA projects is based on the CEQA statutory language, as explained above, and that conclusion is strongly supported by Commission precedent.

CBD raises a number of other claims regarding how and when we must conduct the Carlsbad PPTA CEQA review. (CBD App. Rehg., at pp. 10-13.) Again, all of these arguments fail because SDG&E's Carlsbad PPTA application is not a CEQA project, and

> therefore, none of the CEQA review requirements are applicable. (See Decision, at pp. 30-31, fn 23.)[56]

The same conclusions apply here. The Commission's approval of the Puente Contract authorized SCE to meet its LCR need through the Puente Contract and recover costs incurred under the Puente Contract through rates. SCE is not the builder or the owner of the Puente Project. The Puente Project will be built by NECO, an entity that is not subject to the Commission's general jurisdiction. The Commission does not have authority to approve, deny, or condition construction of a power plant by a non-utility independent power producer such as NECO. The CEC, not the Commission, is the state agency with discretionary (and exclusive) authority over the construction of the Puente Project, a thermal power plant with a capacity in excess of 50 MW. The Warren-Alquist Act, codified in the PR Code, specifies that the CEC has "exclusive power" to certify all such thermal power plants, and confirms that the issuance of a CEC license "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency."[57] Commission approval of the Puente Contract thus does not allow construction of the Puente Project to proceed, and construction could proceed without Commission approval if the CEC authorizes construction. For all of the reasons explained in the Commission's prior decisions, approval of the Puente Contract is not a project for purposes of CEQA.

Finally, even if the Commission's approval of the Puente Contract were technically a "project," which it is not for the reasons discussed above, CEQA provides an exemption for actions undertaken by public agencies relating to any thermal power plant that will be licensed by the CEC. Pursuant to PR Code section 21080(b)(6), CEQA does not apply to:

> Actions undertaken by a public agency relating to any thermal powerplant site or facility, including the expenditure, obligation, or

[56] D.15-11-024 at 2-4 (footnotes omitted).

[57] PR Code section 25500.

> encumbrance of funds by a public agency for planning, engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water (except groundwater), steam, or power for a thermal powerplant, if the powerplant site and related facility will be the subject of an environmental impact report, negative declaration, or other document, prepared pursuant to a regulatory program certified pursuant to Section 21080.5, which will be prepared by the State Energy Resources Conservation and Development Commission, by the Public Utilities Commission, or by the city or county in which the powerplant and related facility would be located if the environmental impact report, negative declaration, or document includes the environmental impact, if any, of the action described in this paragraph.[58]

The CEC is the "State Energy Resources Conservation and Development Commission" referenced in the statute, and its thermal power plant siting and environmental review process is a certified regulatory program pursuant to PR Code section 21080.5. The CEC's certified regulatory program entails a full environmental review of potential project impacts and imposes requirements necessary to ensure that all potential environmental impacts are mitigated to below significant levels. This further demonstrates that the Filing Parties' CEQA arguments are without merit.

2. The Commission is not a CEQA "responsible agency" for the Puente Project.

CEJA/Sierra Club argue that the Commission is a "responsible agency" for the Puente Project under CEQA, and therefore is required by CEQA to "await completion of CEQA review by the lead agency, which is the CEC" before approving the Puente Contract.[59] As explained above, the Commission has confirmed that it is not a "responsible agency" under CEQA when it approves purchase power contracts. A "responsible agency" is defined as a public agency other than the lead agency which has discretionary approval power over the project.[60] As the

[58] *See also* CEQA Guidelines, 14 Cal. Code Regs. section 15271.

[59] CEJA/Sierra Club AFR at 14.

[60] PR Code section 21069.

Commission confirmed: "While the Commission has considerable discretion over whether to approve a purchase power contract, it does not have power to approve or deny the underlying generation project."[61]

As it has done in the past, CBD raises a number of other claims regarding when and how the Commission must conduct an environmental review of the Puente Project, or wait for completion of the CEC's environmental review,[62] but all of CBD's arguments fail because approval of the Puente Contract is not a CEQA project.

3. Approval of the Puente Contract does not transform the Commission into the CEQA "lead agency" for the Puente Project.

The City purports to "join" CEJA/Sierra Club's CEQA argument with the modification that "the Commission is the first agency to exercise discretion over the Puente project," and "is therefore the lead agency under CEQA and required to conduct environmental review of the Puente project."[63] The City has not met the requirements of PU Code section 1732. Further, the City's arguments in its briefs in this proceeding are without merit, as explained below.

a. The City has not met the requirements for a legally adequate application for rehearing.

The City does not explain how the Decision contains legal error, but instead merely drops a footnote with a citation to its opening and reply briefs. The City's purported "Application for Rehearing" does not comply with the requirements of PU Code section 1732, which requires applications for rehearing to "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful or erroneous." The City's filing also fails to comply with Rule 16.1(c), which states that "the purpose of an application for rehearing is to

[61] D.15-05-051 at 29-30.

[62] CBD AFR at 5-16.

[63] City AFR at 1.

alert the Commission to legal error." The City fails to identify and explain any legal errors with the Decision. The City's citation, without explanation, of arguments it made in briefs in this proceeding is insufficient to meet the requirements of PU Code section 1732.[64]

b. The City's briefs in the proceeding do not demonstrate legal error in the Decision.

In its opening brief, the City wrongly argued that the Commission must act as the CEQA lead agency for the Puente Project because approval of the Puente Contract would foreclose alternatives or mitigation measures that would ordinarily be part of CEQA review of the Puente Project.[65] As explained in NRG's reply brief, this is not true, as nothing in NECO's testimony, or its application for certification for the Puente Project, could dictate or constrain the CEC's authority to consider alternatives or require mitigation.[66]

The City also wrongly alleged that NECO's witness, Ms. Gleiter, testified that "contract approval will provide significant financial momentum to the Puente project," and "makes it far more likely that the CEC will approve its project."[67] The City's brief blatantly misrepresented Ms. Gleiter's testimony. In reality, when Ms. Gleiter was asked to confirm that "NRG has determined that PUC approval here makes it more likely that it will receive approval of this project from the CEC", Ms. Gleiter responded: "No, that is definitely not true."[68]

The City's CEQA argument also relied on language in *Save Tara v. City of West Hollywood* stating that "before conducting CEQA review, agencies must not `take any action' that significantly furthers a project `in a manner that forecloses alternatives or mitigation

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[64] D.16-05-053 at 16.

[65] City Opening Brief at 17-18.

[66] NRG Reply Brief at 23-30.

[67] City Opening Brief at 18.

[68] Reporter's Transcript, Volume 2 (NRG/Gleiter) at 340:16-21.

measures that would ordinarily be part of CEQA review of that public project.' "[69] However, this principle does not apply because Commission approval of the Puente Contract does not, and could not, constrain the CEC's authority to analyze alternatives or require mitigation in compliance with CEQA.

The *Save Tara* holding does not apply here. In *Save Tara,* the Court addressed "the question of whether and under what circumstances an agency's agreement allowing private development, conditioned on future compliance with CEQA, constitutes approval of the project within the meaning of sections 21100 and 21151" of CEQA.[70] The case involved an agreement entered into by the City of West Hollywood conveying to a developer an option to purchase certain city-owned real estate for use to construct a housing development, with an additional commitment by the city (not conditioned on CEQA compliance) to contribute toward development costs. The city's obligation to convey the property was conditioned on all applicable requirements of CEQA having been satisfied. The petitioners sought a decision holding that the city was required to prepare an environmental impact report for the housing development project *before* it agreed to convey the property to the developer. The Court held that: "A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review."[71]

Here the Commission is not conveying any property to NECO, or agreeing to explore or move forward with a public-private partnership with NECO. The Commission also is not

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[69] *Save Tara v. City of West Hollywood,* 45 Cal. 4th 116, 138 (2008)

[70] *Id.* at 121.

[71] *Id.* at 132.

granting approval for construction of the Puente Project to proceed. Commission approval of the Puente Contract also does not, and could not, commit the CEC to approve the Puente Project or limit the scope of the CEC's environmental review of the Puente Project. Although the City and other parties insisted on using this proceeding to object to the Puente Project on environmental grounds, the only action that the applicant requested is for the Commission to approve the Puente Contract and authorize rate recovery. Consistent with the Commission's long-standing and recently affirmed precedent on utility power purchase agreements (discussed above), approval of the Puente Contract is not a "project" for purposes of CEQA. It follows that the Commission is not the CEQA lead agency for the Puente Project.

4. The Commission was not required to consider CEQA arguments that have been rejected repeatedly in prior Commission decisions.

CBD alleges that the Decision erred by not addressing CBD's argument that CEQA requires the Commission to conduct an environmental review, but CBD has not identified any legal error.[72] As explained in detail above, the Commission has consistently held that its review and approval of a utility power purchase contract is not a "project" for purposes of CEQA. The issue was raised and addressed in several recent Commission decisions, including in direct response to the same arguments that CBD repeats in its Application for Rehearing. The Commission was not required to revisit its well established precedent on CEQA simply because CBD repeated the same flawed legal arguments that have already been addressed and rejected in prior Commission decisions.

PU Code section 1705 also does not require the Commission to address CBD's baseless CEQA argument. PU Code section 1705 provides that a Commission decision "shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision . . ." It is within the Commission's discretion to determine what

[72] CBD AFR at 16.

factors are material to its decision based on the issues before it.[73] PU Code section 1705 does not require the Commission to make express legal and factual findings as to each and every issue or sub-issue raised by a party to a proceeding.[74]

Further, the Scoping Memo did not include the question of whether CEQA review is required. The Scoping Memo recognized that the CEC is the lead agency under CEQA and the agency with jurisdiction to conduct the environmental review of the Puente Project. The Scoping Memo only included the question of whether the Commission should defer its approval to wait for CEC approval.[75] The Decision addressed that topic and included findings and conclusions material to the Commission's decision not to delay approval to await the outcome of the CEC's review.[76]

F. Approval of the Puente Contract Did Not Violate the Loading Order.

CBD argues that the Commission violated PU Code section 454.5 and the Loading Order because the Decision "does not address preferred resources in any way; there are no findings of fact or conclusions of law regarding compliance with section 454.5 or the Commission's duties to comply with the preferred resources loading order and to protect the environment."[77] CBD argues that the Commission failed to address CBD's sponsored testimony, which argued that preferred resources are available for procurement in the Moorpark sub-area.[78] CBD also argues that the results of the LCR RFO for Moorpark violate the Loading Order due to the high percentage of gas-fired generation.[79]

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[73] *Clean Energy Fuels,* 227 Cal. App. 4th at 659.

[74] D.16-05-053 at 6.

[75] Decision at 7-8.

[76] *Id.* at 19-22.

[77] CBD AFR at 2.

[78] CBD AFR at 3-4, 25-26.

[79] CBD AFR at 21-25.

CBD's arguments are without merit. The Decision cites SCE's testimony confirming that "it was not possible to procure the required minimum level of incremental capacity using only preferred resources," and notes that "SCE contends that it demonstrated that a gas-fired project must be part of the Moorpark reliability solution, and proved that the Puente Contract was the superior gas-fired offer."[80] These statements are supported by the record. SCE solicited offers from all categories of resources, including energy efficiency, demand response, renewable resources, combined heat and power resources, distributed generation, energy storage, and gas-fired generation.[81] SCE's testimony confirms that "[a]ll resource types competed for the authorized 215 to 290 MW in the Moorpark sub-area, with no minimum or maximum MW requirements for Preferred Resources."[82] SCE's testimony further explains that: "A combination of Preferred Resources and GFG will be needed to resolve the reliability issues in the Moorpark sub-area."[83] SCE's testimony showed that SCE selected the Puente Contract because it was "the most cost effective GFG offer available to meet the minimum total" required procurement of 215 MW.[84] SCE's testimony explained that the selected contracts were the "best combination of offers" and "allowed SCE to select cost-competitive Preferred Resources offers."[85] The Independent Evaluator confirmed that the selected contracts are the best resources available from a competitive solicitation.[86]

[80] Decision at 23, citing Exh. SCE-2, Appendix D at D-42.

[81] Exh. SCE-1 (Cushnie) at 1:8-12.

[82] Exh. SCE-1 (Cushnie) at 7:15-16.

[83] Exh. SCE-1 (Cushnie) at 7:16-18.

[84] Exh. SCE-1 (Singh) at 45:18 through 46:2, 9-10.

[85] Exh. SCE-1 (Singh) at 46:7-9.

[86] Exh. SCE-2, Appendix D (Independent Evaluator Report) at 39.

The Decision also found that selection of the Puente Contract was consistent with the Commission's findings in D.13-02-015 that gas-fired resources at the current OTC sites are "certain" to meet the LCR need, explaining:

> D.13-02-015 made several Findings of Fact which are relevant to our independent analysis of the Puente Project contract. Finding of Fact 26 stated: "Gas-fired resources at the current OTC sites are certain to meet the ISO's criteria for meeting LCR needs. Other resources can also meet LCR needs but may not be effective in doing so." Finding of Fact 38 states: "The ISO has shown that there is a need for in-area generation with operational characteristics similar to retiring OTC plants in the Moorpark sub-area of the Big Creek/Ventura local area." Finding of Fact 39 states: "The most likely locations for [sic] to meet LCR needs in the Moorpark sub-area are the sites of the current OTC plants."[87]

The Decision also considered the CAISO's testimony, which showed that the Puente Contract and other procured resources will help maintain reliability. The Decision agreed with the CAISO "that the Puente Project is necessary to meet identified local reliability need in the Moorpark sub-area."[88] After weighing the evidence, the Decision concluded that the LCR RFO process was reasonable and complied with D.13-02-015, and found that the Puente Project "is expected to provide necessary grid reliability benefits at a reasonable cost to ratepayers."[89]

These findings do not violate PU Code section 454.5 or the Loading Order. By its terms, PU Code section 454.5, in its entirety, applies to utility procurement plans, which were not at issue in this proceeding. The Loading Order is established through Commission order, but as the Commission recently confirmed, "all relevant authority acknowledges that the Loading Order requirements must be balanced with the State's reliability and economic needs."[90] "As both the Legislature and the Commission have repeatedly emphasized, the need for reliability is

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[87] Decision at 24-25.

[88] *Id.* at 25.

[89] *Id.* at 26.

[90] D.16-05-053 at 9, citing D.14-03-004 at 13.

paramount in the utility's procurement efforts."[91] In this proceeding, SCE demonstrated that it solicited offers for all resource types, including preferred resources that rank high in the loading order. SCE also demonstrated that "with the exception of energy storage ("ES"), SCE selected every Preferred Resource final offer it received in the Moorpark sub-area, and still had to select a large [gas fired generation ("GFG")] project to meet the minimum procurement authorization of 215 MW."[92] Based on the record in this proceeding, and the findings in D.13-02-015 that existing OTC sites are the ideal location for new LCR capacity, the Decision's approval of the Puente Contract was reasonable and did not constitute legal error.

The Decision also was not required to give weight to CBD's sponsored testimony asserting that the Southern California Regional Energy Network has identified 200 MW of preferred resources in the Moorpark sub-area. As stated above, SCE explained that it selected every preferred resource final offer it received (with the exception of some ES), and still had to select a gas-fired resource to meet the minimum procurement authorization of 215 MW.[93] CBD has not shown that the resources cited in its testimony were bid into the LCR RFO, or otherwise available to SCE for contracting.

G. The Decision Did Not Rely on Inadmissible Hearsay.

CEJA/Sierra Club argue that the Commission incorrectly relied on "hearsay" in approving the Puente Contract.[94] They cite SCE's testimony that "qualitative factors reinforced SCE's quantitative assessment that the NRG Energy Center was the best option to meet the LCR

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[91] *Id.* at 9; D.14-03-004 at 13 ("California law repeatedly emphasizes the importance of maintaining the reliability of the electric grid."), Conclusion of Law 37 ("It is prudent to promote preferred resources to the greatest extent feasible, subject to ensuring a continued high level of reliability."); PU Code section 334 ("Reliable electric service is of paramount importance to the safety, health and comfort of California.").

[92] Exh. SCE-7 (Cushnie) at 1:20 through 2:1.

[93] Exh. SCE-7 (Cushnie) at 1:20 through 2:2.

[94] CEJA/Sierra Club AFR at 15-17.

need."[95] CEJA/Sierra Club point to the restructuring of the Puente Contract as a resource adequacy contract to address debt equivalence impacts, and argue that this demonstrates that "the quantitative analysis resulted in an offer SCE could not accept."[96] CEJA/Sierra Club then repeat CEJA's argument presented in the proceeding that SCE's selection of the Puente Contract was inappropriately based on "qualitative" assessments regarding the risk of resource shortages due to the possible retirement of existing non-OTC peaking resources owned by NRG South.[97]

The Decision properly rejected CEJA/Sierra Club's argument, and found that:

> As SCE explains in its reply brief at 11, the qualitative factors reinforced SCE's quantitative assessment that the NRG Energy Center was the best option to meet the LCR need. SCE's assessment combining qualitative and quantitative factors is consistent with its procurement plan. The outcome of SCE's RFO was found by the Independent Evaluator to be the best resource available from the RFO and was found by the CAISO to meet the LCR needs of the Moorpark sub-area.[98]

The Decision's findings are supported by the record. SCE's testimony explained the quantitative valuation process that was used to select the winning contracts.[99] The Independent Evaluator's report explained that: "The quantitative analysis focused on net market value – namely, the value of a resource's energy, ancillary services, and capacity benefits (based on SCE's forecast of future power and fuel prices) minus fixed and variable offer-related costs"; and "Fundamentally, this was the same across all resource types."[100] SCE's testimony showed that

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[95] CEJA/Sierra Club AFR at 15, citing Decision at 25-26. The Decision and SCE's testimony sometimes refer to the Puente Project as the NRG Energy Center.

[96] CEJA/Sierra Club AFR at 16.

[97] CEJA/Sierra Club AFR at 11-20.

[98] Decision at 25-26, Finding of Fact 9 ("The NRG Puente Project contract's economics and general terms and conditions represent the best resource available from the RFO."), and Finding of Fact 10 ("SCE's assessment combining qualitative and quantitative factors in evaluating the NRG Puente Project is consistent with its procurement plan.").

[99] Exh. SCE-1 (Singh) at 30-49 and 47:12-19.

[100] Exh. SCE-2, Appendix D (Independent Evaluator Report) at 5.

SCE selected the Puente Contract because it was "the most cost effective GFG offer available to meet the minimum total" required procurement of 215 MW.[101] Additional qualitative factors may have supported its selection, but the Puente Contract won due to its net market value.

The Independent Evaluator performed an independent, parallel evaluation of the offers and concluded that all of the selected contracts merit Commission approval "because the contracts' economics and their general terms and conditions represented the best resources available from a competitive solicitation."[102]

Finally, SCE's debt equivalence analysis, which caused SCE to structure the Puente Contract as a resource adequacy contract rather than a tolling agreement, did not alter the conclusion that the Puente Contract offered the best value.[103]

H. Substantial Evidence Supports the Decision's Finding that SCE's LCR RFO Process Complied With Commission Requirements.

CBD argues that SCE impermissibly solicited offers for resources to be operational before 2021,[104] but CBD has not shown how this constitutes legal error in the Decision. SCE's procurement plan, which was approved by the Energy Division, stated that SCE would be soliciting offers in the LCR RFO that would be online as early as 2015 in the Goleta area. This was consistent with D.13-02-015, which did not prohibit resources coming online before 2021 but merely required that resources be online *by* 2021. Further, CBD's argument does not apply to the Puente Contract, which provides for the Puente Project to commence deliveries in 2020, shortly before the 2021 deadline.

[101] Exh. SCE-1 (Singh) at 45:18 through 46:2, 9-10.

[102] Exh. SCE-2, Appendix D (Independent Evaluator Report) at 39.

[103] Exh. SCE-1 (Singh) at 47-48; Exh. SCE-2, Appendix D (Independent Evaluator Report) at 20-21.

[104] CBD AFR at 26-27.

CBD also argues that the LCR RFO schedule did not allow sufficient time for preferred resources vendors to participate, and alleges that the LCR RFO was "designed to discourage preferred resources" based on security requirements and the lack of a form contract for distributed generation ("DG").[105] These claims are baseless. SCE communicated through the LCR RFO documents and at the bidder's conference that it was willing to work with bidders to customize contracts.[106] Offers were submitted for DG and SCE ultimately signed customized DG contracts with SunPower (parent company of Solar Star California), which were approved in the Decision.[107]

CBD's claim that "the requirement of security prejudiced the RFO against preferred resources,"[108] is equally unsubstantiated. Although SCE required some level of development security for all resources to help ensure the resources showed up to maintain the reliability of the system, SCE had different development security requirements for different products.[109] SCE noted that the development security amount for preferred resources was significantly lower than that required for entities who signed contracts for gas-fired generation.[110] Lower security requirements would tend to encourage, not discourage, participation by preferred resources.

I. The Commission Was Not Required to Reconsider the Need Determination Adopted in D.13-02-015.

CBD argues that the Commission erred by not reviewing the validity of the need determination adopted in D.13-02-015 based on changed circumstances and CBD's questioning of whether SCE's McGrath peaking facility was included in the CAISO modeling analysis that

[105] CBD AFR at 27-29.

[106] SCE Reply Brief at 29.

[107] SCE Reply Brief at 29.

[108] CBD AFR at 29-30.

[109] SCE Reply Brief at 29-30.

[110] SCE Reply Brief at 29-30.

was the basis for the D.13-02-015 need determination.[111] CBD also argues that the Decision wrongly concluded that the need determination depended upon the retirement of Mandalay Units 1 and 2 and Ormond Beach OTC units.[112] These arguments are without merit.

First, the Commission is not required to reevaluate the need determination adopted in an LTPP decision when it approves contracts that were executed to fill the approved need. The Commission has confirmed that its established procurement and planning process is to determine utility local capacity requirements need in general procurement decisions, such as D.13-02-015, and not to reconsider those need determinations when approving contracts proposed to fill the approved need, "absent an unforeseen emergency."[113] This reflects the Commission's preference that a contract review proceeding "should not reconsider the Commission's original need determination where one has been made, for the sake of utility predictability and an orderly government process in which settled issues are not rehashed endlessly."[114] Decisions concerning how to organize Commission proceedings are entirely within the Commission's discretion.[115] It was not legal error for the Commission to follow its preferred practice of not reconsidering a need determination adopted in a prior LTPP decision.

Second, the existence of the McGrath peaker does not eliminate the need determination adopted in D.13-02-015. As SCE testified, the McGrath peaker was modeled in the 2014-2015 CAISO Transmission Plan.[116] The CAISO also testified that: "The results of SCE's 2013 Moorpark RFO are consistent with the CAISO's planning assumptions in the 2014-2015

[111] CBD AFR at 30-32.

[112] CBD AFR at 35-36.

[113] D.15-11-024 at 10.

[114] D.06-11-048 at 10.

[115] *Pacific Telephone and Telegraph Co. v. Public Utilities Comm*. (1965) 62 Cal. 2nd 634, 647.

[116] Exh. SCE-7 (Chinn) at 11:5-11.

transmission plan"; and "The resources selected in the RFO meet the minimum procurement requirements set forth in the Commission's Track 1 long-term procurement plan decisions, and they are effective and necessary to meet long-term reliability needs as demonstrated by the CAISO's analysis."[117] Therefore, no adjustment to the need authorization was necessary.

Finally, CBD's allegation that the Commission should reconsider the need determination based on allegations that some OTC units may not actually retire by their OTC compliance deadline is also without merit. To prepare the studies underlying the D.13-02-015 need determination, the CAISO and the Commission assumed that all of the OTC capacity in the Moorpark sub-area would retire at the end of 2020, which is the deadline for those units to comply with the State Water Resources Control Board ("SWRCB") policy on the use of OTC. D.13-02-015 acknowledged that some OTC plant owners had preserved a so-called "Track 2" compliance path, which would allow their units to comply with the OTC policy and continue operating, stating: "We are aware of some efforts by specific OTC plant owners to comply with one of the SWRCB tracks to avoid retirement."[118] Ultimately, however, the Commission concluded that: "At this time, it is reasonable to accept as a fact that, based on information available today, OTC plants will close as per the SWRCB schedule;" and "It is reasonable to assume that the OTC plants in the SCE territory required to comply with SWRCB regulations will comply through retirement or repowering consistent with the SWRCB schedule, for the purpose of LCR forecasting in this proceeding."[119] The Decision appropriately and accurately referenced these factual findings in D.13-02-015, stating: "The need determination of the

[117] Exh. CAISO-1 (Sparks) at 4:7-12.

[118] D.13-02-015 at 42.

[119] *Id.* at 42 and Finding of Fact 10.

Moorpark sub-area in D.13-02-015 depended upon the retirement of Mandalay Units 1 and 2 and Ormond Beach once-through-cooling generation units."[120] No legal error occurred.

III. CONCLUSION

As explained above, no Filing Party has demonstrated legal error, or shown that the Decision is unlawful or erroneous. Rehearing is not required or warranted, and the Applications for Rehearing should be denied.

July 18, 2016

Respectfully submitted,

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[120] Decision at 25 and Finding of Fact 13.